IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION(BAIL) NO. 28 OF 2007

Shri Soumit Ranjan Jena,
Son of Sandeep Jena,
Major of age, 30 years,
Office at 2nd floor,
Pelician Building,
Opp. Lohia Maidan,
Margao Goa. ... Applicant

versus

State of Goa
Represented by the P.I.
Margao Town Police Station. ... Respondent

Mr. S. Pourohit and Mr. J. K. Jha, Advocates for the Applicant.

Mrs. Winnie Coutinho, Public Prosecutor for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 21ST APRIL, 2007.

ORAL ORDER

The applicant herein is the proprietor of M/s. Jena Enterprises and by application under consideration he seeks anticipatory bail from his arrest in Crime No.141/2006 of Margao Town Police Station, under Sections 464, 465, 468, 471, 420 r/w 34 IPC which has been filed against him and his father Sandeep Jena at the behest of MSTC Ltd.(Mineral Scrap Trading Corporation

Ltd.), by their application dated 10-5-2006.

2. The applicant approached the Court of Sessions for anticipatory bail but his application was rejected by Order dated 15-12-2006 and as such has filed the present application.

3. There is no dispute that there was a memorandum of agreement dated 14-4-2006 entered into between MSTC Ltd. and the applicant, as the proprietor of the said M/s. Jena Enterprises. The said agreement was entered into for the supply of iron ore. By virtue of this agreement the applicant was to secure Export Orders from time to time in the name of MSTC for the export of Iron Ore Fines of required quantity and quality and to complete the shipment by complying with all the terms and conditions of the Export Order. The said MSTC was to be the Exporter and title holder of cargo at the time of shipment. The applicant was referred to in the said agreement as an Associate.

4. Pursuant to the said agreement another tripartite agreement was entered into between M/s. Sinom(Hong Kong) Ltd., the said MSTC and the applicant's Jena Enterprises. As per this agreement dated 19-4-2006 the said Sinom(Hong Kong) Ltd. agreed to purchase from MSTC Ltd. 70,000 WMT + 10% at sellers option. The shipment schedule was to be not later than 8-5-2006. There is also no dispute that at the suggestion of the applicant, MSTC Ltd. chartered a vessel by name MT IRAN BIRJAND which was to call on port at Goa on 2-5-2006 but in fact called on 4-5-2006.

5. As per the second agreement the applicant produced three letters, dated 18-4-2006 given by Salgaocar Mining Industries Pvt. Ltd.(SMIPL) to the said MSTC and on the basis of letter dated 28-4-2006 written by him to the MSTC the applicant got released in his favour a sum of Rs.5 crores from the said MSTC. The said advance of Rs.5 crores was paid by the MSTC after the applicant produced the said three letters, all dated 18-4-2006 and after a certificate dated 27-4-2006 was also produced by the applicant certifying that the iron ore lumps approximately of 77,000 metric tonnes was of 58.66 Fe and which were lying stacked at SMIPL jetty, Vagush. It may be stated that one of the said three letters dated 18-4-2006 showed that the said SMIPL had allotted to the applicant lumps of Rs.One lakh metric tonnes of iron ore lumps 58% situated at Vagush jetty. It has now turned up, as per the statement of Arjun Salgaocar, the Director of the said SMIPL that the said three letters were forged and were not genuine. That is another aspect which will be dealt with later.

6. There is also no dispute that when the vessel called on port on 4-5-2006, the applicant was unavailable at his Office at Margao, Goa. There is also no dispute that the applicant was arrested from Margao, Goa by the Delhi Police on the night of 2/3-5-2006 in connection with Crime No.176/2006 of Connaught Palace Police Station, New Delhi and Crime No.146/2006 of Kalkaji Police Station. The first crime was registered under Sections 420, 467, 471, 120-B IPC and the second crime was registered under Sections 420, 468, 467, 466, 471, 120-B IPC. It appears that after registering the present crime on 10-5-2006 a requisition was made by the Investigating Officer on 12-5-2006

through the Chief Judicial Magistrate, Margao to the Additional Chief Metropolitan Magistrate, Patiala House Court, New Delhi and the latter was pleased to inform the Investigating Officer that the applicant would be handed over to Margao Town Police Station, Goa on completion of investigations in the aforesaid Delhi cases. The Investigating Officer was informed by letter dated 16-5-2006. However, it so happened that on 16-10-2006 the applicant came to be released on bail by the Court of Sessions, New Delhi, as stated by his Counsel. Presumably the learned Sessions Judge, New Delhi did not know about the letter dated 16-5-2006 of the Additional Chief Metropolitan Magistrate, Patiala House Court, New Delhi. On being released on bail by the learned Sessions Judge, New Delhi the applicant approached the Court of Sessions, Margao for anticipatory bail and his application came to be rejected by Order dated 15-12-2006.

7. Failure to comply with the tripartite agreement dated 19-4-2006 has given rise to three sets of proceedings. First, the crime registered at Margao Town Police Station by letter dated 10-5-2006 of the MSTC. Second, an application filed under Section 9 of the Arbitration and Conciliation Act, 1996 on 12-5-2006 before the Court of Civil Judge, Senior Division at Margao and also proceedings between Sole Arbitrator Shri Shibdas Banerji at Calcutta, who has been appointed by consent of both the parties namely the applicant and the said MSTC. On behalf of the applicant, it has been stated that the applicant has been attending regularly the said proceedings before the said Arbitrator and it does appear that apart from opposing the application for bail first before the

Court of Additional Sessions Judge and now before this Court nothing was done by the Investigating Officer to arrest the accused in connection with the case registered against him.

8. After the arrival of the vessel on 4-5-2006 the said MSTC approached the Office of the applicant but only not to find him there and obviously because the applicant was in custody of Delhi Police. The MSTC found the father of the accused, who has already been admitted to bail by the learned Additional Sessions Judge and who issued a no objection in favour of the said SMIPL dated 8-5-2006 with copy to MSTC. By this no objection certificate/letter dated 8-5-2006 the father of the applicant informed the said SMIPL that the vessel had arrived on the night of 4-5-2006 and was waiting for loading the cargo but due to certain unavoidable circumstances and as his son had to be away from Goa, he was authorizing MSTC Ltd. to pay Rs.4.40 crores directly to SMIPL for fulfilling the contractual observations for servicing the said contract No. B 0506056 THO dated 19-4-2006 between MSTC Ltd. and M/s. SINOM(Hong Kong) Ltd. By the said letter on behalf of Jena Enterprises, MSTC was requested to pay an amount of Rs.4.4 crores approximately immediately to M/s. Salgaocar Mining Industries Pvt. Ltd. further informing that after the payment of Rs.4.4 crores by MSTC to SMIPL the total amount paid would be Rs.5.90 crores and that the balance amount of Rs.3.5 crores would be paid by them to SMIPL immediately after loading the cargo worth Rs.5.90 crores by SMIPL. Here, it may be noted that although it is now stated that the first three letters dated 18-4-2006 purported to have been issued on behalf of SMIPL were

forged, there was another agreement between SMIPL dated 29-4-2006 which agreement has been admitted by the Director of SMIPL by which SMIPL had agreed to supply 67,000 metric tonnes of iron ore of grade 57/56% Fe for loading the vessel. It was also noted in the said letter/agreement dated 29-4-2006 that since the vessel would require 77,000 metric tonnes, 67,000 metric tonnes would be supplied by SMIPL and the balance of 10,000 metric tonnes would be supplied by the applicant. There is also no dispute that in terms of the said agreement dated 29-4-2006 between the applicant and SMIPL, the applicant was to pay Rs.40,050,000/- in advance on or before 2-5-2006 and the balance amount of Rs.37,0,00,000/- had to be paid by the applicant prior to the sailing of the vessel. There is no dispute that SMIPL received from the applicant a sum of Rs.1.5 crores on 2-5-2006 and presumably that was prior to the applicant being arrested on the same night by Delhi Police. It is not known whether MSTC acted upon the no objection certificate dated 8-5-2006 given on behalf of the applicant, by the applicant's father. However, the fact remains that as the applicant was unavailable to fulfill the tripartite agreement dated 19-4-2006 the said SMIPL entered into another agreement dated 8-5-2006 as a result of which the vessel left after the ore was supplied by SMIPL and although it is not made very clear on behalf of the prosecution, we are inclined to believe that the very ore which the said SMIPL had put at the disposal of the applicant by agreement dated 29-4-2006 that was loaded into the said vessel, though by a separate agreement between SMIPL and MSTC. This is evident from letter dated 9-5-2006 addressed by MSTC to the father of the applicant C/o. Jena Enterprises by which he was called upon to commence loading of the vessel

latest by 11-5-2006 specifically mentioning that in case he failed to commence loading on 11-5-2006, the quantity of 77,000 metric tonnes of material lying in Vagush jetty of which part ownership was already transferred to them, would not be disturbed in any way. This reference to 77,000 metric tonnes is with reference to letter of the applicant dated 19-4-2006 by which the applicant had informed SMIPL that out of the allotted 1,00,000 metric tonnes vide letter dated 18-4-2006, 77,000 tonnes were earmarked to MSTC Ltd. and transferred to them by virtue of the said letter dated 19-4-2006 requesting them to take possession of the same and looking after its custody by appointing security guards in the plot mentioned above. It is not known whether MSTC had acted pursuant to the said letter dated 19-4-2006 by guarding the material by appointing security guards.

9. As per the FIR filed on behalf of the MSTC, on visiting the Office of M/s. Jena Enterprises on 8-5-2006 they found that the applicant was absent but his father was present and claimed to be the proprietor of M/s. Jena Enterprises and gave untenable reasons for the absence of the applicant stating that he was expected back in Goa on 10-5-2006 and then he would organize the loading of the vessel. It is also their case that they contacted R. K. Salgaocar of SMIPL who told them that all the three documents dated 18-4-2006 were forged and that he had not signed the same. It appears that MSTC was informed of the agreement dated 29-4-2006 by which SMIPL had agreed to supply 67,000 metric tonnes of 57/56% Fe. From what transpired between the said Arjun Salgaocar and the officials of MSTC and the father of the applicant, MSTC came

to the conclusion that the applicant and his father had made a false representation to MSTC and conspired to cheat MSTC by taking recourse to commit forgery with a view to make MSTC part an amount of Rs.5 crores thereby causing monetary loss to them.

10. On behalf of the applicant, it is submitted that if at all the applicant was not able to fulfill the tripartite agreement it was because the applicant had to remain in custody of the Delhi Police. Learned Counsel further submits that to prove the bonafides of the applicant, his father had even given a letter to SMIPL requesting them to commence the loading of the vessel from 8-5-2006. Learned Counsel of the applicant submits that if at all the tripartite agreement was not complied with, it was because the applicant was in custody. It is also submitted by the learned Counsel of the applicant that SMIPL had agreed on 29-4-2006 to put at the disposal of the applicant 67,000 metric tonnes of iron ore and that the applicant himself was to arrange another 10,000 metric tonnes and although the 67,000 metric tonnes agreed to be supplied by SMIPL were of 57/56% Fe, the applicant could have always made good the Fe content by supplying or mixing the 10,000 metric tonnes to be arranged by him having a higher percentage of Fe. It is the submission of learned Counsel that he had no intention whatsoever of cheating the said MSTC.

11. On the other hand, learned Public Prosecutor Ms. Winnie Coutinho submits that the applicant based on the said three forged letters made MSTC to part with Rs.5 crores and that the presence of the applicant would be required in

custody in order to recover the said amount. Learned Public Prosecutor further submits that the custodial interrogation of the applicant would also be necessary in order to find out as to what the applicant has done with the said amount. In fact, what the applicant has done with the said amount of Rs.5 crores is quiet evident from the statement of Bank Account filed on behalf of the applicant and the written statement filed by him before the Civil Judge, Senior Division at Margao. As already stated, Rs.1.5 crores were paid by the applicant to SMIPL on 2-5-2006. Another sum of Rs.4.40 lakhs were paid on 29-4-2006 to D. B. Belgaumaresh Pandit, Rs.1 crore to Nawaz Earthmovers, Rs.5 lakhs each to S B Ent and Best Roadways Ltd. respectively and Rs.50 lakhs were withdrawn on the same day to be paid for transport. On behalf of the respondent, it is submitted that the said payments have no connection to the payments to be made towards transportation because in terms of agreement dated 29-4-2006 it is M/s. Salgaocar Industries Pvt. Ltd. who were to load the vessel FOB.

12. The gravamen of the charge against the applicant appears to be the offence of cheating. The allegation that the applicant forged the said three letters dated 18-4-2006 prima facie can be accepted until further investigations are made, in the light of the said statement of the said Arjun Salgaocar of SMIPL who has disowned the said three letters having been issued by him but certainly no police custody would be required to investigate that aspect of the case. It is quite possible that at that stage and prior to the letter of the applicant dated 28-4-2006 the applicant did not have in his hands any ore to be supplied to MSTC but the fact remains that on 29-4-2006, prior to the arrival of the vessel,

and the vessel was schedule to arrive on 2-5-2006, the very day the applicant was arrested, the applicant had in his hands, as per agreement dated 29-4-2006 67,000 metric tonnes of iron ore allotted to him by SMIPL and towards which later on 2-5-2006 the applicant had paid an amount of Rs.1.5 crores to the said SMIPL. There is no doubt that many a cheatings are committed in the course of commercial as well as money transactions. In order to sustain a conviction or for that matter even to make out a prima facie case under Section 420 IPC it must be established that the accused practiced deception and thereby dishonestly induced the person deceived to deliver any property. Refusal to return the money does not show that there was the necessary criminal intent from the beginning. Mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act, but of which the subsequent act is not the sole criterion. In the case at hand, it appears that prior to the arrival of the vessel which was scheduled on 2-5-2006, the applicant had made arrangements to supply the ore to the extent of 67,000 metric tonnes of iron ore to be supplied to MSTC, upon the arrival of the vessel and towards which the applicant had even paid the supplier, namely SMIPL a sum of Rs.1.5 crores. There is no doubt that the applicant was required to pay 4.50 prior to 2-5-2006 and indeed the applicant had paid a sum of Rs.1.5 crores. The balance of Rs.3.70 lakhs was payable prior to the sailing of the vessel. If the applicant was present, he could have made arrangements to make payments. Not all business men have ready money in hand. Prima facie it appears that the applicant was unable to meet his

commitments either to MSTC in terms of the tripartite agreement and to SMIPL in terms of the agreement dated 29-4-2006 because he was taken in custody by Delhi Police. That the accused was taken in custody by Delhi Police in a cheating case could be no indication to suggest that the accused wanted to cheat the MSTC. Considering the aforesaid facts, in my view, this would not be a case where presence of the applicant would be required in custody for completion of further investigations. It would suffice in case the applicant is directed to join investigations by making himself available to the Investigation Officer for a period of 7 days between 8.00 a.m. to 6.00 p.m. In the event of the arrest of the applicant, the applicant would be released on bail upon execution of a bond of Rs.50,000/- with one surety in the like amount to the satisfaction of the Investigation Officer.

13. Application is allowed on the above terms.

N. A. BRITTO, J.

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